IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

HEATHER BURKE,

Plaintiff,

v. **No. 1:16-cv-00470-RJ-SMV**

STATE OF NEW MEXICO GENERAL SERVICES DEPARTMENT, EDWYNN BURCKLE, in official and/or individual capacities as Secretary of the General Services Department, JAY HONE, MICHAEL GALLEGOS, ANGELA DAWSON, BRENDA GUETHS, LARA WHITE-DAVIS, and KAREN BALTZEY, in their official and/or individual capacities as stated below.

Defendant.

MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S AMENDED COMPLAINTS [Docs. 53 & 54]

Defendants State of New Mexico General Services Department, Edwynn Burckle, Jay Hone, Michael Gallegos, Angela Dawson, Brenda Gueths, Lara White-Davis, and Karen Baltzey ("Defendants")[1], pursuant to Rules 12(f) and 15(a)(2) of the Federal Rules of Civil Procedure, move the Court for entry of an order striking Plaintiff's two new "Amended Complaint[s] for Violations of the Fair Pay for Women of Act\Equal Pay Act, the New Mexico Whistleblower Protection Act, 42 U.S.C §1983, the New Mexico Human Rights Act, New Mexico Fraud Against

[1] Pursuant to the Tenth Circuit's Order and Judgment [Doc. 49-1], the only remaining defendant in this case is Edwynn Burckle. *See* Order Vacating Judgment in Part and Granting Plaintiff Leave to File Amended Complaint [Doc. 50], at 2. To date, Plaintiff has not served the additional defendants that she purports to add (or in most cases, re-add) to this lawsuit. Accordingly, Defendants are specially appearing solely for the purposes of moving to strike Plaintiff's Amended Complaints.

Taxpayers Act, Breach of Implied Contract/Good Faith and Fair Dealing, the New Mexico Inspection of Public Records Act and the Family and Medical Leave Act." [Doc. 53 & 54]. Plaintiff has failed to comply with the Tenth Circuit's Order, Judgment, and Mandate, and this Court's Order Vacating Judgment in Part and Granting Plaintiff Leave to File Amended Complaint [Doc. 50]. Instead, Plaintiff unilaterally and improperly filed two Amended Complaints [Docs. 53 & 54] that violate the tenth Circuit's and this Court's Orders by adding additional allegations, claims, and defendants beyond that permitted by the Court and without seeking leave to do so under Rule 15(a)(2). As a consequence, both Amended Complaints are unauthorized and subject to striking under Rule 12(f).[2] In support of their motion, Defendants state as follows:

I. LITIGATION BACKGROUND

On April 21, 2016, Plaintiff filed a "Verified Complaint for Violations of the Fair Pay for Women Act, the New Mexico Whistleblower Protection Act, and 42 U.S.C §1983" [Doc 1-2]. In her Complaint, Plaintiff named the following defendants: State of New Mexico, Edwynn Burckle, Jay Hone, Michael Gallegos, Angela Dawson, Brenda Gueths, and Karen Baltzey. On June 27, 2016, Defendants moved to dismiss Plaintiff Heather Burke's Complaint for Violations of the Fair Pay for Women Act, the New Mexico Whistleblower Protection Act, and 42 U.S.C. § 1983 for failure to state a claim on which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6) and for Plaintiff's failure to plead a short and plain statement of her claims pursuant to Fed. R. Civ. P. 8. [Doc. 10]. After Defendants filed their Motion to Dismiss, Plaintiff filed her Motion to File Amended Complaint and Memorandum of Law in Support [Doc. 29].[3] Defendants opposed

[2] Plaintiff's Amended Complaint is also improperly captioned in that it refers to the First Judicial District of the State of New Mexico rather than this Court.

[3] Plaintiff initially filed an Amended Complaint without seeking leave of the Court as required by Rule 15(a)(2). [Doc. 18]. Thereafter, Defendants moved to strike the Amended Complaint [Doc. 21] and Plaintiff filed a Motion for Leave to Amend [Doc. 29].

Plaintiff's proposed Amended Complaint on the grounds that Plaintiff's Amended Complaint suffered from the same problems detailed in Defendants' Motion to Dismiss the filed Complaint and would otherwise be futile. [Doc. 35]. This Court granted Defendants' Motion to Dismiss and denied Plaintiff leave to amend as futile on October 3, 2016. [Doc. 41].

Plaintiff appealed the dismissal of her Complaint and denial of leave to amend to the Tenth Circuit. On June 8, 2017, the Tenth Circuit issued its Order and Judgment in which it affirmed in part and reversed in part the district court's order. [Doc. 49-1]. In its Order, the Tenth Circuit affirmed the district court's judgment "insofar as it (1) dismissed Ms. Burke's individual-capacity § 1983 claims; (2) dismissed her [Fair Pay for Women Act ("FWPA")] discrimination and retaliation claims; and (3) dismissed her [Whistleblower Protection Act ("WPA")] claim against the defendants in their individual capacities." Order & Judg. [Doc. 49-1], at 20.

The Tenth Circuit reversed the district court's order dismissing Plaintiff's WPA claim against Secretary Burckle in his official capacity and vacated the district court's judgment to the extent that it "dismissed" § 1983 claims against Secretary Burckle in his official capacity. *Id.*

The Tenth Circuit affirmed the district court's denial of leave to amend except to the extent that Plaintiff was allowed to amend to: (1) add FPWA and EPA discrimination claims naming the New Mexico General Services Department ("GSD") as a defendant; (2) name the GSD as a defendant in her WPA claim; and (3) attempt to state an amended privacy claim under Section 1983. *Id.* at 20-21.

On August 15, 2017, this Court entered its Order Vacating Judgment in Part and Granting Plaintiff Leave to File Amended Complaint [Doc. 50]. The Order granted Plaintiff leave to (1) "amend her privacy claim under 42 U.S.C. § 1983 and cure the deficiencies noted in the Tenth Circuit's Order and Judgment"; (2) "name GSD as a defendant in this action"; (3) "add a WPA claim against GSD in addition to Plaintiff's WPA claim against Edwynn Burckle, in his official capacity"; and (4) "add discrimination claims under New Mexico's Fair Pay for Women Act ('FPWA') and the federal Equal Pay Act ('EPA') against GSD." *Id.* at 1-2. Additionally, this Court observed that because the Tenth Circuit affirmed the district court's dismissal of Plaintiff's claims against the State of New Mexico and all individual defendants except for Secretary Burckle, "the only remaining defendant in this case is Edwynn Burckle, in his official capacity as Secretary of the General Services Department." *Id.* at 2. Pursuant to this Court's Order, Plaintiff was to file her Amended Complaint on or before September 5, 2017. *Id.* at 1.

On September 5, 2017, Plaintiff filed an Amended Complaint [Doc. 53]. Plaintiff then filed a second Amended Complaint [Doc. 54] on September 13, 2017. Both complaints are well beyond the Tenth Circuit's Mandate and this Court's Order implementing same. In her Amended Complaints, Plaintiff attempts to add individual defendants that had previously been dismissed from the lawsuit (Defendants Hone, Gallegos, Dawson, Gueths, and Baltzey), add an individual capacity suit that was previously dismissed (Defendant Burckle), and also add an additional individual defendant (Defendant White-Davis). Plaintiff further attempts to add new claims not permitted by the district court nor the Tenth Circuit, including Count IV (Violation of New Mexico Human Rights Act – Gender Discrimination and Harassment), Count V (Violation of New Mexico Human Rights Act – Disability Discrimination), Count VI (Violation of New Mexico Human Rights Act – Failure to Accommodate), Count VII (Violation of New Mexico Fraud Against Taxpayers Act), Count VIII (Violation of New Mexico Inspection of Public Records Act), Count IX (Breach of Contract and Breach of Implied Covenant of Good Faith and Fair Dealing), and Count X (Violation of the FMLA – Interference).

On September 13, 2017, Plaintiff filed a second Amended Complaint [Doc. 54]. Plaintiff's wholly unpermitted and late second Amended Complaint adds 21 new paragraphs to the September 5th Amended Complaint and makes additional changes to the allegations contained in the Amended Complaint filed on September 5th. *See id.* For this Court's convenience, a copy of Plaintiff's Second Amended Complaint [Doc. 54] with all changes to her earlier-filed Amended Complaint [Doc. 53] is attached as Exhibit 1.

To date, none of the newly-added additional Defendants have been properly served as required by the rules.

With this Motion, Defendants move to strike Plaintiff's timely-filed September 5, 2017 Amended Complaint [Doc. 53] on the grounds that it does not comport with the Tenth Circuit's Mandate or this Court's Order Vacating Judgment in Part and Granting Plaintiff Leave to File Amended Complaint. As made clear by the appellate and district court orders in this case, the only permissible defendants in Plaintiff's Amended Complaint are the GSD and Defendant Burckle (official capacity only) and the only permissible causes of action are a Section 1983 "Right to Privacy" claim, a FPWA/EPA discrimination claim, and a WPA claim. The September 5th Amended Complaint should be struck in its entirety as it contains multiple allegations which can only be asserted in support of unpermitted claims and Defendants cannot parse the 265 paragraphs to attempt to divine which are relevant only to the unpermitted claims.[4] Defendants also move to strike Plaintiff's Second Amended Complaint [Doc. 54] in its entirety as it suffers from the same problems as the September 5th Amended Complaint [Doc. 53], and because it is not timely and Plaintiff did not obtain leave of the Court to file it.

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[4] Alternatively, this Court may simply strike the additional causes of action and defendants that Plaintiff impermissibly added to the Amended Complaint without leave of the Court.

II. ARGUMENT

a. Plaintiff's September 5, 2017 Amended Complaint [Doc. 53] exceeds the scope of the leave to amended granted by the Tenth Circuit and this Court.

The Tenth Circuit—in reversing in part the district court's order dismissing all of Plaintiff's claims and denying leave to amend—held that Plaintiff should have leave to amend her Complaint to include the following: (1) add FPWA and EPA discrimination claims naming the New Mexico General Services Department ("GSD") as a defendant; (2) name the GSD as a defendant in her WPA claim; and (3) submit an amended privacy claim under Section 1983. [Doc 49-1] at 20-21. The Tenth Circuit did not hold that Plaintiff has an unlimited right to amend her Complaint but instead narrowly set the parameters under which she may file an Amended Complaint.

This Court and Plaintiff are bound by the Tenth Circuit's Order and Judgment in this case. "The mandate rule is a corollary to the law of the case [doctrine] requiring trial court conformity with the appellate court's terms of remand." *United States v. West*, 646 F.3d 745, 748 (10th Cir. 2011). "The mandate rule[] provides that a district court must comply strictly with the mandate rendered by the reviewing court." *Zinn v. Congrove*, 755 F.3d 1177, 1182 (10th Cir. 2014) (internal quotation marks and citation omitted). Here, this Court implemented the Tenth Circuit's Mandate by issuing an Order Vacating Judgment in Part and Granting Plaintiff Leave to File Amended Complaint expressly outlining the scope of to-be-filed Plaintiff's Amended Complaint as directed by the Tenth Circuit.

Plaintiff, however, has not complied with the Tenth Circuit's Mandate or with this Court's mandate-implementing Order. Rather, her newly-filed Amended Complaint vastly exceeds the permitted scope set by the Tenth Circuit and this Court by adding numerous additional claims and defendants (many of whom had previously been dismissed by this Court). Under such circumstances, her Amended Complaint should be struck in its entirety[5] or the portions of her Amended Complaint that she was not granted leave to include must be struck by this Court.

Where, as here, a plaintiff's amended complaint exceeds the scope of the leave granted to amend, a Motion to Strike under Rule 12(f) is appropriate. Rule 12(f) allows a court to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. Proc. 12(f). While motions to strike are generally disfavored by courts where such motions are brought as a dilatory tactic or in an attempt to "beautify" the pleadings, courts nonetheless have wide discretion to grant such motions, particularly where a plaintiff's pleading fails to comport with the Rules of Civil Procedure and relevant court orders. *See United States v. Garcia*, 221 F. Supp. 3d 1275, 1285-86 (D.N.M. 2016); *Lane v. Page*, 272 F.R.D. 581, 600 (D.N.M. 2011); *see, e.g., Jones v. Metro. Life Ins. Co.*, No. C–08–03971–JW (DMR), 2010 WL 4055928, at *6 (N.D. Cal. Oct. 15, 2010) ("[B]ased on its inherent powers, a court may strike material from the docket, including portions of a document, reflecting procedural impropriety or lack of compliance with court rules or orders."); *Rubio ex rel. Z.R. v. Turner Unified Sch. Dist. No. 202*, 475 F. Supp. 2d 1092, 1097-98 (D. Kan. 2007) (noting that where a plaintiff does not seek leave to amend, a court will ordinarily strike the amended complaint).

"[W]here leave to amend is given to cure deficiencies in certain specified claims, courts have agreed that new claims alleged for the first time in the amended pleading should be dismissed or stricken." *GeoData Sys. Mgmt., Inc. v. Am. Pac. Plastic Fabricators, Inc.*, No. CV 15-04125VAP, 2016 WL 6601656, at *4 (C.D. Ca. Jul. 25, 2016) (internal quotation marks and citations omitted); *see also The Cincinnati Ins. Co. v. Cochran*, No. 05-16867, 2006 WL 4495335,

[5] Defendants request that the entire September 5th Amended Complaint be struck because it is impossible for Defendants to parse through the allegations in the 265-paragraph Complaint to determine which are related to the unpermitted additional causes of action and improperly-added new defendants.

at *3 (11th Cir. Dec. 27, 2006) (affirming dismissal of a newly-asserted counterclaim that exceeded the scope of the district court's grant of leave to amend); *Jameson Beach Prop. Owners Ass'n v. U.S.*, No. 2:13-cv-01025-MCE-AC, 2014 WL 4925253, at *3 (E.D. Ca. Sept. 29, 2014) ("[W]here a prior court order granted limited leave to amend, [d]istrict [c]ourts in this circuit generally strike new claims or parties contained in an amended complaint when the plaintiff did not seek leave to amend."). For example, in *Concerned Citizens for a Safe Cmty. v. Office of Fed. Detention Trustee*, No. 09-04109, 2011 WL 2971000, at *2 (D. Nev. Jul. 19, 2011), the district court granted "leave to amend for the limited purpose of curing the standing deficiencies." Thereafter, the plaintiff filed an amended complaint adding an additional claim, a new prayer for relief, and two new defendants. *Id.* Concluding that the plaintiff's amended complaint "contravened" the court's order granting leave to amend, the court granted the defendants' motion to strike the non-conforming portions of the plaintiff's amended complaint, including the additionally-named defendants. *Id.*

Here, Plaintiff's Amended Complaint contravenes the Tenth Circuit's Mandate and this Court's Order, which granted Plaintiff leave to amend to name the GSD as a defendant for her FPWA, EPA, and WPA claims, and to correct deficiencies with her Section 1983 "right to privacy" claim. [Doc 49-1] at 20-21; [Doc. 50] at 1-2. Plaintiff's Amended Complaint, however, goes well beyond those directives by re-adding previously dismissed Defendants (Defendants Hone, Gallegos, Dawson, Gueths, and Baltzey), adding a new defendant (Defendant White-Davis), and adding seven new causes of action (Counts IV through X). Because Plaintiff has not been granted leave to amend her complaint in such a manner, the entire Complaint or, alternatively, the offending portions, should be struck as a matter of law. *See, e.g., The Cincinnati Ins. Co.*, 2006 WL 4495335, at *3; *GeoData Sys. Mgmt., Inc.*, 2016 WL 6601656, at *4; *Jameson Beach Prop.*

Owners Ass'n, 2014 WL 4925253, at *3; *Concerned Citizens for a Safe Cmty.*, 2011 WL 2971000, at *2; *Jones*, 2010 WL 4055928, at *6; *Rubio ex rel. Z.R.*, 475 F. Supp. 2d at 1097-98. Indeed, the entire September 5th Amended Complaint should be struck as it contains multiple allegations which can only be asserted in support of unpermitted claims and Defendants should not be required (as it has previously been required to do for the original and prior amended complaints), to parse through 265 paragraphs to attempt to divine which are relevant only to the unpermitted claims.

b. Plaintiff's September 13, 2017 Amended Complaint [Doc. 54] should be struck in its entirety because it is not timely and leave was not granted to amend.

In this Court's Order Vacating Judgment in Part and Granting Plaintiff Leave to File Amended Complaint [Doc. 50), Plaintiff was granted 21 days to file an amended complaint comporting with the directives set out by the Tenth Circuit and this Court. Plaintiff timely filed an Amended Complaint on September 5, 2017. [Doc. 53]. On September 13, 2017, inexplicably and without seeking leave of this Court, Plaintiff filed a second Amended Complaint [Doc. 54] in which she added 21 new paragraphs and made additional changes to existing allegations. *See* Exh. 1.

Pursuant to Rule 15(a)(1), "a party may amend *once* without the permission of the court or the consent of any of the other parties . . . if the party does so either within 21 days after serving the pleading or within 21 days after service of a responsive pleading or after the service of a motion under Rule 12(b), (e), of (f), whichever is earlier." 6 Fed. Prac. & Proc. Civ. § 1480 (3d ed.) (footnotes omitted and emphasis added). "When this time period expires *or the party has already amended the pleading*, this provision no longer applies and an amendment falls under Rule 15(a)(2), which requires leave of the court or the written consent of the opposing party." *Id.* (footnote omitted and emphasis added); *see also U.S. ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1166 (10th Cir. 2009) ("Once the time for amendment as a matter of course has passed, *pleadings can be amended only by consent of the opposing party or leave of the court.*" (emphasis added)).

Here, the time to amend Plaintiff's Complaint has long since passed and she must therefore obtain leave of the court to file any new amended complaints. While leave was granted to file an amended complaint by September 5, 2017, Plaintiff did not seek nor obtain leave to file a second amended complaint on September 13, 2017. Under the plain terms of the rule and well-established precedent, plaintiff should have moved for leave to file her September 13, 2017 Amended Complaint. Because she did not do so, her putative "Amended Complaint" is ineffective. For these reasons, Defendants request that this Court strike the attempted September 13, 2017 Amended Complaint [Doc. 54].

Additionally, Plaintiff's second Amended Complaint suffers from the same deficiencies as her September 5, 2017 Amended Complaint in that it vastly exceeds the scope of leave granted by the Tenth Circuit. Accordingly, it should also be struck on those grounds as well, as outlined above in the previous section.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court enter an Order:

- Striking Plaintiff's September 5th Amended Complaint [Doc. 53] in its entirety under Rule 12(f);
- Alternatively, striking Counts IV through X of Plaintiff's September 5, 2017 Amended Complaint [Doc. 53] and Defendants Hone, Gallegos, Dawson, Gueths, Baltzey, and White-Davis as violative of the relevant Court orders allowing amendment and outside the scope of leave granted to amend; and

- Striking Plaintiff's September 13th Amended Complaint [Doc. 54] in its entirety as untimely and filed without leave to amend.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2017, I caused to be served via Regular U.S. Mail a true and correct copy of the foregoing *Motion and Memorandum in Support of Defendants' Motion to Strike Plaintiff's Amended Complaints [Docs. 53 &54]*, on:

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/s/ Jaclyn M. McLean
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